Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1993

EDWARD BILLHEIMER,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

JAMES P. FERRY
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111 North Wyoming Street
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4681
Lutz Appellate Services, inc.
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QUESTION PRESENTED

Whether a criminal defendant convicted of felony crimes and facing a sentence of imprisonment of up to ten (10) years was denied the constitutional Sixth Amendment right to the effective assistance of counsel where trial counsel spent a total of approximately one half hour conferring with the petitioner and his witnesses throughout the representation which included approximately ten minutes in March of 1988 conferring with the petitioner, his wife and son moments before the Preliminary Hearing, ten (10) minutes in a telephone conversation wih the petitioner approximately one (1) month later, and ten (10) minutes moments before the trial began, and failed to contact two potential alibi witnesses, and failed to call either alibi witness to testify at the trial.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
A. Facts Material to Consideration of the Question Presented.	2
Reasons for Granting the Writ	4
Conclusion	6

TABLE OF CITATIONS

Cases Cited:

Middleton v. Duggar, 849 F.2d 491 (C.A. 11 Fla. 1988)	5, 6
Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 674 (1984)	5, 6

Contents

Page

Statutes Cited:

18 Pa. C.S.A. § 3123(5) 2

18 Pa. C.S.A. § 4304 2

18 Pa. C.S.A. § 6301 2

28 U.S.C. § 1257(3) 1

United States Constitution Cited:

Sixth Amendment ..... i, 2, 3, 6

Fourteenth Amendment 2, 6

APPENDIX

Appendix A — Order of the Supreme Court of Pennsylvania, Middle District Dated October 20, 1993 ..... 1a

Appendix B — Order of Supreme Court of Pennsylvania, Middle District Dated November 20, 1993 ..... 3a

Appendix C — Judgment of the Superior Court of Pennsylvania Dated December 12, 1991 ..... 5a

Appendix D — Sentencing Report of the Court of Common Pleas, Criminal Division, County of Luzerne Dated October 4, 1990 ..... 14a

Contents

Page

Appendix E — Order and Opinion of the Court of Common Pleas of Luzerne County, Criminal Division Dated September 4, 1990 ..... 16a

Appendix F — Sentencing Report of the Court of Common Pleas, Criminal Division, Luzerne County Dated January 13, 1989 ..... 25a

Appendix G — Order of the Court of Common Pleas of Luzerne County Dated April 6, 1989 ..... 27a

Appendix H — Motion for New Trial and/or in Arrest of Judgment in the Court of Common Pleas of Luzerne County 28a

Appendix I — Motion to Amend Motion for New Trial and/or in Arrest of Judgment in the Court of Common Pleas of Luzerne County 30a

Appendix J — Transcript of Testimony (Excerpts) of Frank Horning at Evidentiary Hearing on Defendant's Post Trial Motion Alleging Ineffective Assistance of Counsel Held January 5, 1990, and Completed January 12, 1990, Before Honorable Donald O'Malley, Specially Presiding Judge of the Court of Common Pleas of Luzerne County 32a

Appendix K — Transcript of Testimony (Excerpts) of Defendant at Evidentiary Hearing on Defendant's Post Trial Motion Alleging Ineffective Assistance of Counsel Held January 5, 1990, and Completed January 12, 1990, Before Honorable Donald O'Malley, Specially Presiding Judge of the Court of Common Pleas of Luzerne County 36a

Contents

Page

Appendix L — Transcript of Testimony of Carol Billheimer (Defendant's Wife) at Evidentiary Hearing on Defendant's Post Trial Motion Alleging Ineffective Assistance of Counsel Held January 5, 1990, and Completed January 12, 1990, Before Honorable Donald O'Malley, Specially Presiding Judge of the Court of Common Pleas of Luzerne County 44a

Appendix M — Transcript of Testimony of Adrian Billheimer (Defendant's Son) at Evidentiary Hearing on Defendant's Post Trial Motion Alleging Ineffective Assistance of Counsel Held January 5, 1990, and Completed January 12, 1990, Before Honorable Donald O'Malley, Specially Presiding Judge of the Court of Common Pleas of Luzerne County 48a

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania denying the petitioner's Application for Reconsideration of Denial of Allowance of Appeal is reported at __, and is reprinted in the appendix hereto, page 1a.

The opinion of the Supreme Court of Pennsylvania denying the petitioner's Petition for Allowance of Appeal is reported at __, and is reprinted in the appendix hereto, page 3a.

The judgment of the Superior Court of Pennsylvania dated December 12, 1992, affirming the lower court's decision against the petitioner is reported at __, and is reprinted in the appendix hereto, pages 5a - 13a.

The decision of the trial court dated September 4, 1990, Common Pleas of Luzerne County, denying petitioner's Post Trial Motion is unreported, and is reprinted in the appendix hereto, pages 16a - 24a.

The sentence of the trial court, dated October 4, 1990, is not reported, and is reprinted in the appendix at pages 14a - 15a.

The trial court's finding the petitioner guilty of violating criminal statutes dated January 13, 1989, is unreported, and is reprinted in the appendix hereto, page 25a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered October 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence.

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Question Presented.

The petitioner was convicted after a trial by jury of violating various Pennsylvania statutes.[1, 2]

He was sentenced to five (5) to ten (10) years in prison.[3] Petitioner filed post trial motions which were supplemented following the replacement of trial counsel with appellate counsel.[4]

The post trial motion was supplemented to raise the issue of "ineffective assistance of counsel," per order of the Court of

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1. 18 Pa. C.S.A. § 3123(5); 18 Pa. C.S.A. § 6301; 18 Pa. C.S.A. § 4304.

2. Appendix pages 25a - 26a.

3. Appendix pages 14a - 15a.

4. Appendix pages 28a - 31a.

Common Pleas of Luzerne County by the Honorable Gifford Cappellini dated April 6, 1989.[5]

The federal question involved the constitutional right to the assistance of counsel, first raised by that April 6, 1989 motion and order of court, permitting the amendment by new counsel of the post trial motion to include a claim of "ineffective assistance of counsel."

The petitioner believes that the outcome of the trial may have been different had he been afforded the Sixth Amendment right to the "effective" assistance of counsel.

Trial counsel failed to properly investigate facts which were a defense to the crime alleged, to wit: two potential alibi witnesses were identified by the petitioner, but neither contacted nor called to testify by trial counsel.[6]

At the evidentiary hearing on the Defendant's Motion for New Trial and/or Arrest of Judgment (as supplemented), one of the alibi witnesses testified as to the alibi he provided the petitioner, that is, that the petitioner was with him on dates and times he allegedly committed certain criminal acts.[7]

That potential alibi witness further testified that defense counsel never contacted him to discuss what testimony he could offer, and that, though available, he was not called to testify at the trial.[8]

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5. Appendix page 27a.

6. Transcript, Evidentiary Hearing on Post Trial Motion for New Trial and/or Arrest of Judgment, Appendix pages 36a-43a.

7. Appendix pages 32a-35a.

8. Appendix pages 34a-35a.

The petitioner testified at the same evidentiary hearing that, to his knowledge, no other witnesses whose name he provided trial counsel were contacted nor called to testify at the trial.[9]

Those witnesses who were called to testify, petitioner's wife and son, confirmed at the evidentiary hearing on post trial motions that they were not contacted prior to testifying, other than being told to "just answer 'Yes or No.' "[10]

At the evidentiary hearing, the petitioner testified that trial counsel spent only approximately one-half (1/2) hour in total time discussing the case with him, his wife and son.[11] This consisted of eight (8) to ten (10) minutes prior to the Preliminary Hearing on the charges before the District Justice, ten (10) minutes in a phone conversation between the petitioner and trial counsel about one month later, and ten (10) minutes with the petitioner, his wife and son the morning of and just prior to the trial itself, at least nine (9) months after being originally charged.

No adverse or contradictory testimony was presented to the testimony of the petitioner, his wife, son or Mr. Horning at those evidentiary hearings on the Post Trial Motion claim of ineffective assistance of counsel.

REASONS FOR GRANTING THE WRIT

The minimal time expended by trial counsel could not have availed the petitioner with the effective assistance of counsel. It is unlikely that he could fully understand the nature of the charges. It

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9. Appendix page 39a.

10. Appendix page 51a.

11. Appendix page 38a.

is evident that he could not meaningfully take part in his own defense, since trial counsel failed to even contact, let alone call, potential alibi witnesses.

The jury should have heard at least Mr. Morning, the content of whose testimony clearly provides an alibi defense rendering it impossible for the petitioner to have committed the crimes alleged to have occurred in January of 1988.

That representation by trial counsel fails to meet minimal standards for the assistance of counsel under Your Honorable Court's decision in *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). Trial counsel's assistance falls ". . . below objective standards of reasonableness." *Id.* at 668, 104 S. Ct. at 2065. He should have spent more time with the petitioner to fully explain all aspects of the charges, and to allow the petitioner to meaningfully take part in developing his own defense. He should have investigated further, at least by contacting the identified alibi witnesses so that he could decide whether legal strategy would benefit from either of their testimony. That conduct fails to meet the guidance set forth in the United States Court of Appeals decision, *Middleton v. Duggar*, 849 F.2d 491 (C.A. 11 Fla. 1988).

Secondly, under the *Strickland, supra,* test there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The failure to investigate the proposed testimony of the alibi witnesses, failure to call either to testify at the trial, and expending such a minimal time with the petitioner and his witnesses, especially considering the seriousness of the charges, and the ultimate sentence of up to ten (10) years in prison clearly exemplifies conduct that ". . . so undermines the proper

functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland, supra.*

The decision of the Supreme Court of Pennsylvania, in allowing the trial court's finding of guilt and sentencing to stand, is contrary to the decision in *Strickland, supra,* and *Middleton v. Duggar, supra.* The only just result would be the reversal of the decisions below.

CONCLUSION

The petitioner was denied the effective assistance of counsel guaranteed by the Constitution of the United States, Sixth Amendment, and due to state court criminal defendants under the Fourteenth Amendment. The results of the trial may very well have been different but for the ineffective assistance. A reversal of the Pennsylvania Supreme Court's decision is respectfully requested.

Respectfully submitted,

JAMES P. FERRY
Attorney for Petitioner
111 North Wyoming Street
Hazleton, Pennsylvania 18201
(717) 455-4710

Dated: January 18, 1994.

APPENDIX A — ORDER OF SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DATED OCTOBER 20, 1993

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Charles W. Johns, Esquire
Prothonotary

434 Main Capitol Building
P.O. Box 524
Harrisburg, Pennsylvania 17108

Milded E. Williamson
Deputy Prothonotary

(717) 787-6181

October 20, 1993

James P. Ferry, Esquire
105 N. Wyoming St.
Hazleton, PA 18201

Re: COMMONWEALTH OF PENNSYLVANIA

v. EDWARD BILLHEIMER
No. 0037 M.D. Allocatur 1992

Dear Petitioner,

This is to advise that the following Order has been endorsed on the Application for Reconsideration of Denial of Allowance of Appeal in the above-captioned matter.

"10/18/93
Petition Denied.
Per Curiam"

Appendix A

Sincerely yours,

s/ Shirley J. Phipps
PROTHONOTARY'S OFFICE
SUPREME COURT OF
PENNSYLVANIA

c: Del Sole, Beck, Hudock, JJ.
Superior 174PHL91
O'Malley, Donald, Sr.J. (Spec. Pres.) Luzerne
Criminal 1039ABC1988
Peter Paul Olszewski, Esquire
Scott C. Gartley, Esquire

APPENDIX B — ORDER OF SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DATED NOVEMBER 20, 1993

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Charles W. Johns, Esquire
Prothonotary

434 Main Capitol Building
P.O. Box 524
Harrisburg, Pennsylvania 17108

Milded E. Williamson
Deputy Prothonotary

(717) 787-6181

November 20, 1993

James P. Ferry, Esquire
105 N. Wyoming St.
Hazleton, PA 18201

Re: COMMONWEALTH OF PENNSYLVANIA

v. EDWARD BILLHEIMER
No. 0037 M.D. Allocatur 1992

Dear Petitioner,

This is to advise that the following Order has been endorsed on the Petition for Allowance of Appeal in the above-captioned matter.

"11/18/93
Petition Denied.
Per Curiam"

Appendix B

Sincerely yours,

s/ Shirley J. Phipps
PROTHONOTARY'S OFFICE
SUPREME COURT OF
PENNSYLVANIA

c: Del Sole, Beck, Hudock, JJ.
Superior 174PHL91
O'Malley, Donald, Sr.J. (Spec. Pres.) Luzerne
Criminal 1039ABC1988
Peter Paul Olszewski, Esquire
Scott C. Gartley, Esquire

APPENDIX C — JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA DATED DECEMBER 12, 1991

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00174 Philadelphia 1991

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

EDWARD BILLHEIMER,

Appellant

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Luzerne County be, and the same is hereby AFFIRMED.

By the Court:

s/ David S. Ezagle
PROTHONOTARY

Dated: DECEMBER 12, 1991

Appendix C

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00174 Philadelphia 1991

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

EDWARD BILLHEIMER,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Luzerne County at No. 1039 A B C of 1988

BEFORE; DEL SOLE, BECK and HUDOCK, JJ.

MEMORANDUM:

This appeal follows Appellant's conviction by a jury of two counts of involuntary deviate sexual intercourse[1], four counts of corruption of minors[2], and four counts of endangering the welfare of children[3]. Appellant was sentenced to five (5) to ten (10) years in

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1. 18 Pa. C.S.A. §3123(5)

2. 18 Pa. C.S.A. §6301

3. 18 Pa. C.S.A. §4304

prison on the involuntary deviate sexual intercourse conviction, and all other convictions merged for sentencing purposes.[4] Appellant filed post-trial motions which were supplemented following the appointment of new counsel. These motions were denied, and Appellant filed his notice of appeal in this action. We affirm.

Appellant's conviction stems from alleged sexual misconduct by Appellant with his minor daughter. Appellant raises the following issues in his appeal:

> Whether the Trial Court Judge erred in sentencing the Defendant-Appellant, and in denying the Defendant-Appellant's Post Trial Motions for New Trial and/or Arrest of Judgment, which were based upon the following grounds:
>
> 1. That the Trial Court Judge erred by allowing the Commonwealth to present evidence of the Defendant's conduct with the victim with dates other than those alleged in the information; and
>
> 2. That the Trial Court Judge erred in overruling Defendant's demurrer to corrupting the morals of a minor charge, 18 Pa.C.S.A. 6301(1), in that the

---

4. We note that the record reflects a motion by the Commonwealth to modify sentence alleging that the crimes do not merge. The record does not reflect that the trial court over disposed of this motion and the Commonwealth has not filed a cross-appeal in this matter. We will therefore not address this issue.

Appendix C

> Commonwealth did not produce evidence beyond a reasonable doubt that the victim's morals were corrupted or tended to be corrupted; and
>
> 3. That the Trial Court Judge erred in overruling Defendant's demurrer to endangering the welfare of children charge in that the Commonwealth's evidence failed to prove beyond a reasonable doubt that the Defendant failed to provide care, protection and support to the victim. 18 Pa.C.S.A. 4304; and
>
> 4. Whether a new trial and/or Arrest of Judgment should be granted due to ineffective assistance of Counsel.

Appellant's Brief at 2. We will address these issues in the order presented by Appellant.

Appellant's first issue, whether certain evidence should have been admitted by the trial court concerning other acts involving Appellant and his daughter, is addressed to the discretion of the trial court. As such, we will not reverse absent an abuse of that discretion by the trial court. *Concorde Investments, Inc. v. Gallagher,* 345 Pa.Super. 49, 497 A.2d 637 (1985). Appellant argues that the trial court should not have admitted evidence of acts whose dates are other than those charged in the criminal complaint. We disagree. We have long held that acts between the defendant and the victim are admissible as evidence of a common plan, or scheme by defendant, toward that victim. *Commonwealth v.*

Leppard, 271 Pa.Super. 317, 413 A.2d 424 (1979). This is true whether or not the dates fall outside the dates alleged in the complaint, or, indeed, whether the dates fall outside the applicable statute of limitations for criminal charges against the defendant for those particular acts. *Id.* Since we are not faced with testimony by third parties concerning acts involving Appellant and third parties, we find Appellant's reliance on *Commonwealth v. Bradley,* 243 Pa.Super. 208, 364 A.2d 944 (1976) and *Commonwealth v. Kasko,* 322 Pa.Super. 62, 469 A.2d 181 (1983) misplaced. We agree with the trial court that the testimony established a pattern of sexual misconduct by Appellant. The victim testified that such conduct happened twice a week each week from the period when she was thirteen (13) years old up to and continuing when she was fifteen (15) and sixteen (16) years old. Because the testimony concerns conduct between Appellant and the complaining victim, we cannot say the trial court abused its discretion when it admitted this evidence.

Appellant's second and third issues go to whether the trial court improperly denied Appellant's demurrer on the corruption of the morals of a minor and endangering the welfare of a child convictions. We note that Appellant, who presented a defense following the trial court's denial of his demurrer, is precluded from challenging the denial on appeal. *See Commonwealth v. Graham,* 385 Pa.Super. 393, 561 A.2d 331 (1989).

Finally, Appellant claims he did not have effective assistance of counsel. In order to sustain a challenge to effective assistance of counsel, Appellant must establish three elements:

> First, the appellant must show that his underlying claim is of arguable merit. If he succeeds, the appellant must then demonstrate

> that the course chosen by counsel was not reasonably designed to protect the appellant's best interests. If the appellant is able to prove these elements, he must then establish that he was actually prejudiced by counsel's improper course of conduct.

Commonwealth v. Davis, 518 Pa. 77, 541 A.2d 315 (1988); *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973 (1987). Appellant raises four grounds for this issue. First, Appellant claims that "[a]t least one (1), and perhaps more alibi witnesses were not even contacted by prior Counsel, let alone submitted as witnesses at trial." Appellant's Brief at 10. Although the post-trial motion hearing transcript[5] does name two witnesses which Appellant indicates he identified to his trial counsel, we do not know what these potential witnesses would have testified to or whether their testimony would have substantially increased Appellant's chances for success had they testified. *Commonwealth v. Rainey,* 282 Pa.Super. 15, 422 A.2d 652 (1980). Therefore, Appellant's first ground is without merit.

Next, Appellant claims it was ineffective assistance of counsel because "between one-half hour and one hour in total time was spent by previous Counsel conferring with him and other witnesses in preparing for a Preliminary Hearing, Pre-Trial Motions and Hearing, interviewing and preparing witnesses, and preparing for trial." Appellant's Brief at 10. Our Supreme Court has stated:

> [T]he time actually spent by counsel with the

---

5. We note that only a portion of the post-trial motion hearing transcript was submitted as part of the official record. We may consider only the evidence made a part of the official record.

> accused discussing his case is not necessarily related to, and affords no basis for inferring, the extent of total trial preparation. The length of time counsel engaged in conversations with his client is only one factor to be considered. Equally as important is the complexity of the legal and factual issues presented, the nature of the charges, the possible defenses available, the availability of witnesses, the strength of the case against the client, and the alternatives that were present.

Commonwealth v. Sisco, 482 Pa. 459, __, 393 A.2d 1197, 1198-99 (1978). The trial court stated in its opinion:

> On the 5th of October 1988, [trial counsel] filed a request for Discovery under Rule 305 (b)(1) "a-g" together with copy [sic] of any statements given by the alleged victim to any agency providing counsel to her. On the 12th October 1988, trial counsel filed a motion to suppress defendant's confession.
>
> We further point out the conduct; the transcript of the trial (beginning on N.T. p. 12) indicates that [trial counsel] not only elected to make his opening . . .; a review of [trial counsel's] opening remarks showed he was aware of the facts, both to be presented by the defendant and as produced by the Commonwealth. He defined the issue, and the only possible defense. "On behalf of the defendant, he denied the allegations which

> were buttressed by the mother of the victim testifying that she was present on the alleged dates of the crimes and the victim made no complaint to her."
>
> As the testimony of the victim began, [trial counsel] interposed a cogent objection - to the testimony of other offenses; even though the Court overruled the objection, it showed an awareness of the facts and possibly pertinent law on behalf of the defendant's attorney.
>
> * * *
>
> [Trial counsel's] cross examination of [the victim] (N.T. 32-57) showed an awareness of a list of medicines, family history, schooling, where her brother worked, and the extra job her mother engaged in. Again showing a thorough prior familiarity with the case.

Trial Court Opinion at 6-7. Appellant's assertion that trial counsel took less than an hour in preparing for the case is wholly unsupported by the official record as the brief in support of Appellant's allegation of ineffective assistance of counsel was not made a part of the official record in this matter. Taking all the factors into consideration and the record before us, we find Appellant's claim to be without merit.

And, finally, Appellant claims that it was ineffective assistance of counsel because he was not informed of the seriousness of the charges against him. Appellant relies on *Commonwealth v. Davis*, 267 Pa.Super. 118, 406 A.2d 547 (1979)

to support his contention. *Davis* concerned whether a defendant was fully informed in order to enter a valid guilty plea. We find Appellant's reliance on *Davis* misplaced. The trial court in the present situation stated:

> [T]he defendant had consulted with the trial counsel prior to the preliminary hearing on 10 March 1988. An explicit statement of probable cause had been executed by Daniel Yursha, investigator, outlining the victim's testimony available to trial counsel. As his attorney, he was personally called first hand and introduced to the Commonwealth's case. On the 17th of August 1988, wherein the defendant filed a waiver on Rule 1100 admitted "... having been fully advised of my rights after consultation with may [sic] attorney..."

Trial Court Opinion at 5-6.

Having found that Appellant was fully advised of his rights after consultation with his attorney, we find Appellant's argument is without merit. We therefore find that Appellant did not have ineffective assistance of counsel with respect to any of the grounds he raises in his appeal.

Judgment of sentence affirmed.

APPENDIX D — SENTENCING REPORT OF THE COURT OF COMMON PLEAS, CRIMINAL DIVISION, COUNTY OF LUZERNE DATED OCTOBER 4, 1990

COURT OF COMMON PLEAS — CRIMINAL DIVISION
COUNTY OF LUZERNE

THE COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD BILLHEIMER

CHARGE: *Endg. Welfare of Children (4 cts.)*
Invol. Deviate Sex Inter. (2 cts.)
Corr. of Minors (4 cts.)

No. *1039* 1988

DATE: *Oct. 4, 1990*

SENTENCING:
ON 1039 OF 1988 - INVOL. DEV. SEX. INTER. - DEFT. SENTENCED TO A STATE INSTITUTION FOR A MIN. OF 5 YEARS NOR MORE THAN 10 YEARS - CREDIT FOR 1 DAY SERVED

FINE: $1.00
PAY COSTS, PLUS FEES.

ALL OTHER CHARGES IN 1039A, 1039B, & 1039C WILL MERGE FOR SENTENCING WITH 1039 OF 1988

DEFT. HAS 10 DAYS TO FILE MOTION FOR A NEW TRIAL

Appendix D

RIGHT TO APPEAL 30 DAYS

DEFT. - REMANDED

CLERK *s/ John Hyder* *s/ O'Malley* JUDGE

APPENDIX E — ORDER AND OPINION OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY, CRIMINAL DIVISION DATED SEPTEMBER 4, 1990

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY --- CRIMINAL

NO. 1039, A, B, C of 1988

COMMONWEALTH OF PENNSYLVANIA

VS.

EDWARD BILLHEIMER

ORDER

AND NOW, to wit, this *4th* day of *September* 1990 at *2:35* o'clock *P.*M., the Defendant's Motion for a New Trial and/or in Arrest of Judgment is without merit and the same is hereby DISMISSED.

The Defendant is hereby directed to appear for sentencing on *Thursday, October 4, 1990 at 9:30 A.M.*, at the Luzerne County Courthouse, Second Floor, Court Room No. 5, Wilkes-Barre, PA 18711. The Court directs a pre-sentence investigation report be made by the Luzerne County Adult Probation/Parole Office on the above defendant.

BY THE COURT,
s/ Donald C. Molley
S.J.

Appendix E

District Attorney's Office,
for the Commonwealth
James Ferry, Esq.
for the Defendant
Clerk of Courts
Adult Probation/Parole Office
Sheriff's Office
Court Stenographer

Appendix E

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY --- CRIMINAL

NO. 1039, A, B, C of 1988

COMMONWEALTH OF PENNSYLVANIA

VS.

EDWARD BILLHEIMER

OPINION

This is an appeal from the conviction of the defendant of two counts of Involuntary Deviate Sexual Intercourse (18 Pa.C.S.A. 3123(5), four counts of Corruption of Minors (18 Pa.C.S.A. 6301), and four counts of Endangering the Welfare of Children (18 Pa.C.S.A. 4304) after a jury trial on January 13, 1989.

He was found not guilty of Indecent Assault (four counts) (18 Pa. C.S.A. 3126).

HISTORY OF CASE

A Motion for New Trial and/or In Arrest of Judgment was filed by his trial counsel, Patrick Flannery of the Public Defender's Office, on January 18, 1989. Subsequently Mr. Billheimer discharged Mr. Flannery.

James P. Ferry, Esquire, assumed representation, and was given leave of the Court by Order of April 6, 1989 to add as Post Trial grounds ineffective assistance of counsel by Mr. Flannery.

Appendix E

All the convictions were based upon evidence of the same acts, to wit: engaging in oral sex, and fondling of his then minor daughter, Dawn and masturbating while engaged in those activities, on four specific dates and times January 8 and 20th, and December 3rd and 10th, all in 1987.

On the first two dates, she was just under 16, her birthday falling on February 13th. On the latter two dates, in December of 1987.

QUESTIONS PRESENTED AND ARGUMENT

A. DID THE COURT ERR IN ALLOWING THE COMMONWEALTH TO PRESENT EVIDENCE OF DEFENDANT'S CONDUCT WITH THE VICTIM AT DATES OTHER THAN THOSE ALLEGED IN THE INFORMATION?

B. WHETHER THE COURT ERRED IN OVERRULING THE DEFENDANT'S DEMURRER TO THE CORRUPTION OF A MINOR CHARGE IN THAT NO EVIDENCE WAS SUBMITTED TO PROVE BEYOND A REASONABLE DOUBT THAT THE VICTIM'S MORALS WERE CORRPUTED OR TENDED TO BE CORRUPTED.

C. DID THE COURT ERR IN OVERRULING THE DEFENDANT'S DEMURRER TO THE EVIDENCE RELATING TO THE CHARGE OF ENDANGERING THE WELFARE OF CHILDREN BECAUSE THE COMMONWEALTH FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT FAILED TO PROVIDE CARE, PROTECTION OR SUPPORT THE VICTIM?

D. WAS THE DEFENDANT PREJUDICED BY

Appendix E

INEFFECTIVE ASSISTANCE OF COUNSEL, RESULTING IN HIS CONVICTION?

A. DID THE COURT ERR IN ALLOWING THE COMMONWEALTH TO PRESENT EVIDENCE OF DEFENDANT'S CONDUCT WITH THE VICTIM AT DATES OTHER THAN THOSE ALLEGED IN THE INFORMATION?

DISCUSSION

At the time of the January incidents, the victim was fifteen (15) years old. During trial, Dawn testified that sexual acts initiated by her father began at age thirteen (13) by his grabbing at her rear end and holding her breasts. She stated that his conduct escalated over the next three years.

Thereafter these incidents occurred twice a week each week until approximately at the time of the charged evidence. The defendant relying on *Comm. vs. Bradley* case 364 A.2d 944; 243 Pa. Super. 208 alleges that the prior acts committed by the defendant on his minor daughter should not have been admitted.

The law of Pennsylvania was first set forth in *Comm. v. Bell*, 166 Pa. 405, 31 A.2d 123 (1895) allowed to introduce evidence of illicit relations between the parties prior to the commission of the specific offenses charged in the indictment. This is still the law of Pennsylvania. See *Comm. vs. McClucas*, 857 Pa. Super. 449; 516 A.2d 68 (1986), wherein in the Court held that prior criminal acts in this type of offense are admissible for a particular person who is the victim in the present charges. Judge Spaeth, who sat on both the *Bradley* and *McClucas* cases, quoted to the effect that evidence of prior criminal acts is admissible "to show a passion or propensity for illicit sexual relations with the particular person concerning in the crime at trial."

Appendix E

This motion is without merit and therefore dismissed.

B. WHETHER THE COURT ERRED IN OVERRULING THE DEFENDANT'S DEMURRER TO THE CORRUPTION OF A MINOR CHARGE IN THAT NO EVIDENCE WAS SUBMITTED TO PROVE BEYOND A REASONABLE DOUBT THAT THE VICTIM'S MORALS WERE CORRUPTED OR TENDED TO BE CORRUPTED.

DISCUSSION

The defendant submits that the Commonwealth has failed to prove that the victim's morals were corrupted by the actions of the defendant.

The defendant testified after the demurrer had been overruled and as such the refusal of the demurrer is not available on appeal.

On the other hand, the common sense of the community, as well as the sense of decency, propriety, and the morality which most people entertain is sufficient to apply the statute to each case and to individuate what particular conduct is rendered criminal by it. *Comm. v. Randall*, 183 Pa. Super. 603, 133 A.2d 276 (1957).

This motion is without merit and therefore dismissed.

Appendix E

C. DID THE COURT ERR IN OVERRULING THE DEFENDANT'S DEMURRER TO THE EVIDENCE RELATING TO THE CHARGE OF ENDANGERING THE WELFARE OF CHILDREN BECAUSE THE COMMONWEALTH FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT FAILED TO PROVIDE CARE, PROTECTION OR SUPPORT THE VICTIM?

DISCUSSION

Comm. v. Taylor, 324 Pa. Super. 420, 471 A.2d 1228 (1984), holds that sexual acts toward a minor are sufficient to uphold a conviction of Endangering the Welfare of Children.

This motion is without merit and therefore dismissed.

D. WAS THE DEFENDANT PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL, RESULTING IN HIS CONVICTION?

DISCUSSION

The defendant in his post trial motions alleges that the trial attorney had not spent efficient time with him, had failed to answer his telephone calls to the public defender's office, that the defendant was confused and agitated by not being advised of the precise trial date, that counsel did not call expert witnesses or other witnesses to prove that the defendant did not commit the acts, and that the wife and son of the defendant could have proven that the wife and son had been at home at the time of the alleged criminal actions which would have rendered the alleged incidences impossible. On the other hand, the defendant had consulted with the trial counsel prior to the preliminary hearing on 10 March 1988.

Appendix E

An explicit statement of probable cause had been executed by Daniel Yursha, investigator, outlining the victim's testimony available to trial counsel. As his attorney, he was personally called first hand and introduced to the Commonwealth's case. On the 17th of August 1988, wherein the defendant filed a waiver on Rule 1100 admitted "... having been fully advised of my rights after consultation with may attorney ..."

On the 5th of October 1988, Mr. Patrick Flannery, Assistant Public Defender, filed a request for Discovery under Rule 305 (b)(1) "a-g" together with copy of any statements given by the alleged victim to any agency providing counsel to her. On the 12th October 1988, trial counsel filed a motion to suppress defendant's confession.

We further point out the conduct; the transcript of the trial [beginning on N.T. p. 12] indicates that Mr. Flannery not only elected to make his opening as indicated by the Assistant District Attorney in her brief; a review of Mr. Flannery's opening remarks showed he was aware of the facts, both to be presented by the defendant and as produced by the Commonwealth. He defined the issue, and the only possible defense. "On behalf of the defendant, he denied the allegations which were buttressed by the mother of the victim testifying that she was present on the alleged dates of the crimes and the victim made no complaint to her."

As the testimony of the victim began, Mr. Flannery interposed a cogent objection — to the testimony of other offenses; even though the Court overruled the objection, it showed an awareness of the facts and possibly pertinent law on behalf of the defendant's attorney.

Incidentally, the notes of testimony of the victim showed an

internal consistency and was the same as her original complaint to the social worker, the probable cause, and the defendant's admission to the police.

Mr. Flannery's cross examination of Dawn Billheimer [N.T. 32-57] showed an awareness of a list of medicines, family history, schooling, where her brother worked, and the extra job her mother engaged in. Again showing a thorough prior familiarity with the case.

The defendant failed to show what the testimony of the alleged witnesses would have been. Since, the mother and brother testified to being at home at the time of the offenses contrary to what the victim had testified to. This was presented to the jury and was for their determination.

There is no merit to this exception; the same is therefore dismissed.

APPENDIX F — SENTENCING REPORT OF THE COURT OF COMMON PLEAS, CRIMINAL DIVISION, LUZERNE COUNTY DATED JANUARY 13, 1989

COURT OF COMMON PLEAS — CRIMINAL DIVISION
COUNTY OF LUZERNE

[stamped]
RECEIVED JAN 17 1989

THE COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD BILLHEIMER

No. *1039-1039A, 1039B, 1039C* 1988

DATE: *JAN. 13, 1989*

CHARGE:
*THE JURY FOUND THE DEFT. **GUILTY** ON (2 CTS.) OF INVOL. DEVIATE SEXUAL INTERCOURSE ON (4 CTS.) OF CORRUPTION OF MINORS AND ON (4 CTS.) OF ENDANGERING WELFARE OF CHILDREN - THE (4 CTS.) OF INDECENT ASSAULT WAS **NOT GUILTY.***

THE DEFT. HAS 10 DAYS FROM THIS DATE TO FILE POST VERDICT MOTIONS AND ARREST OF JUDGEMENT.

THE DEFT. IS NOT TO HAVE CONTACT WITH DAUGHTER DAWN BILLHEIMER OR HER BOYFRIEND CHRIS KILLIAN OR PERSONS SHE'S STAYING WITH.

BAIL TO BE CONTINUED.

Appendix F

P.S.I. WITH THE LUZERNE CO. PROBATION IS ORDERED BY THE COURT

PSYCHIATRIC EXAMINATION IS ORDER BY THE COURT.

CLERK *s/ John Hyder* *s/ O'Malley* JUDGE

APPENDIX G — ORDER OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY DATED APRIL 6, 1989

IN THE COURT OF COMMON PLEAS

OF LUZERNE COUNTY

CRIMINAL

No. 1039-A, -B, -C of 1988

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD BILLHEIMER

ORDER

AND NOW, THIS 6th day of April, 1989, upon consideration of the attached Motion, the MOTION TO AMEND MOTION FOR NEW TRIAL AND/OR ARREST OF JUDGMENT is granted and the oral argument set for April 26, 1989, is continued to May 10, 1989. Defendant's Brief due 20 days prior; Commonwealth's Brief due 10 days prior

BY THE COURT:

/s/ Cappellini
J.

APPENDIX H — MOTION FOR NEW TRIAL AND/OR IN ARREST OF JUDGMENT IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

IN THE COURT OF COMMON PLEAS

OF LUZERNE COUNTY * CRIMINAL

No. 1039, -A, -B, -C of 1988

COMMONWEALTH OF PENNSYLVANIA

VS.

EDWARD BILLHEIMER

MOTION FOR NEW TRIAL AND/OR IN ARREST OF JUDGMENT

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The above-named Defendant, Edward Billheimer, against whom a jury returned a verdict on January 13, 1989 of guilty of the charges of Involuntary Deviate Sexual Intercourse (two counts), Corruption of Minors (four counts) and Endangering Welfare of Children (four counts), and not guilty of charges of Indecent Assault (four counts), the Honorable Donald O'Malley, Specially Presiding, by and through his counsel, Patrick J. Flannery, Esq., Assistant Public Defender of Luzerne County, requests Your Honorable Court to grant a new trial, or in the alternative, to arrest judgment, and in support thereof avers the following errors:

1. The Court erred by allowing the Commonwealth to present evidence of Defendant's conduct with the victim at dates other than those alleged in the Information.

Appendix H

2. The Court erred in overruling Defendant's demurrer to corrupting the morals of a minor, 18 Pa. C.S.A. 6301(1), in that the Commonwealth did not produce evidence beyond a reasonable doubt that the victim's morals were corrupted or tended to be corrupted.

3. The Court erred in overruling Defendant's demurrer to endangering the welfare of children in that the Commonwealth's evidence failed to prove beyond a reasonable doubt that the Defendant failed to provide care, protection or support to the victim. 18 Pa. C.S.A. 4304.

WHEREFORE, the Defendant requests Your Honorable Court to grant a new trial or in the alternative to arrest judgment in the above-captioned matter.

Respectfully submitted,

s/ Patrick J. Flannery
PATRICK J. FLANNERY, ESQ.
Assistant Public Defender
Counsel for Defendant

/kct

APPENDIX I — MOTION TO AMEND MOTION FOR NEW TRIAL AND/OR IN ARREST OF JUDGMENT IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

IN THE COURT OF COMMON PLEAS

OF LUZERNE COUNTY

CRIMINAL

No. 1039-A, -B, -C of 1988

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD BILLHEIMER

MOTION TO AMEND MOTION FOR NEW TRIAL AND/OR IN ARREST OF JUDGMENT

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The above named Defendant, Edward Billheimer, by and through his counsel, James P. Ferry, Esquire, being as substituted counsel from his trial and post trial counsel, offers the following Motion:

1. Defendant's trial counsel, and counsel during the period for the filing of post trial motions, was Patrick J. Flannery, Esquire, of the Public Defender's Office.

2. Attorney Flannery filed a Motion for New Trial and/or In Arrest of Judgment, Oral Argument for which has been set for April 26, 1989.

Appendix I

3. Your Movant counsel, James P. Ferry, Esquire, became substitute counsel for post trial and appeal purposes on March 10, 1989.

4. After consultation with the Defendant, the claim of ineffective assistance of counsel during the trial and during the time period for filing post trial motions is appropriate.

5. In order to properly and fully prepare for Oral Argument and admission of a brief in support of the Defendant's post trial motions, if the amendment is permitted, Counsel requires additional time to prepare a brief and for oral argument on the same.

WHEREFORE, it is respectfully requested that the Defendant be permitted to amend his motion for new trial and/or In Arrest of Judgment as requested, and that the Oral Argument set for April 26, 1989, be rescheduled at a time sufficient to provide Counsel the opportunity to prepare a Brief for the Amended Motion and prepare for the Oral Argument.

Respectfully Submitted:

/s/ James P. Ferry
James P. Ferry, Esquire
Attorney for Defendant

APPENDIX J — TRANSCRIPT OF TESTIMONY (EXCERPTS) OF FRANK HORNING AT EVIDENTIARY HEARING ON DEFENDANT'S POST TRIAL MOTION ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL HELD JANUARY 5, 1990, AND COMPLETED JANUARY 12, 1990, BEFORE HONORABLE DONALD O'MALLEY, SPECIALLY PRESIDING JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

[commencing at page 45]

BY MR. FERRY:

Q. Mr. Horning, can you tell me where you reside?

A. Presently, I reside at 304 East Grant Street, McAdoo, Pennsylvania.

Q. Mr. Horning, are you familiar with Mr. Billheimer and all of this family members?

A. Yes. I've known the entire family since October of 1980.

Q. And, Mr. Horning, do you recall during the time frame of January 1987 whether or not you had some knowledge about Mr. Billheimer's location between the — say the time 3:00 and 5:00 each day?

A. Yes. At that time and that particular month, I was doing exstensive [sic] work on one of my mobile homes. I had a little work trailer park getting it ready fo rental by the first of February of that year. And I was there approximately 9:00 in the morning; and I would knock off around 2:00, 2:30 in the afternoon.

Q. And where would you see Mr. Billheimer?

Appendix J

A. At Purcell's Tavern.

Q. And during what time frame would you [46] see him there?

A. Approximately 2:30, until about maybe 5:30 because I'm usually home for 6:00 for super [sic].

Q. Mr. Horning, if you were told that in January of 1987, between 3:00 and 5:00, thereabouts on Thursday, Mr. Billheimer allegedly committed a crime against his daughter, what would your response be?

MS. CIANFLONE: Objection, Your Honor.

THE COURT: I will overrule the objection.

THE WITNESS: I would say somebody was crazy. I'd say it would be impossible.

BY MR. FERRY:

Q. And why is that?

A. Every day, Monday through Friday, from approximately as I said from 2:30 in the afternoon until about 5:30, we would meet at Purcell's or I would see him there with some of my other friends.

It was a routine for me since October of '80 to do this. I'm retried [sic] from the military. And it was part of my every day thing to do; and in the month of January, I worked every [47] day during the week and on two Saturdays during that month to get that mobile home ready for the new tenants to move in. I would say it

would be impossible.

Q. What is your occupation by the way?

A. Retried [sic], United States Army.

Q. Mr. Horning, are you familiar with — have you had the opportunity to observe the Billheimer family and their interrelationship including Dawn Billheimer with her father?

A. Since 1980. I think it was a good family.

MS. CIANFLONE: Your Honor, I am going to object. This is not relevant at this point.

THE COURT: We sustain that.

BY MR. FERRY:

Q. Mr. Horning, would you, based upon what you observed, be surprised to hear that there was testimony by an expert that Dawn Billheimer was fearful of her father and that there was some form of mind control on her?

MS. CIANFLONE: Objection, Your Honor.

THE COURT: We sustain the objection.

[48] By MR. FERRY:

Q. Were you ever contacted by Attorney Flannery or anyone from the Public Defenders' office on behalf of Mr. Billheimer?

A. No, I was not.

Q. Would you have been available to testify?

A. Yes, I would have.

Q. Now, Mr. Horning, in December of 1987, there were two days that these offenses allegedly occurred. Could you say definitely during December of 1987 that you knew where Mr. Billheimer was on any particular dates between 3:00 and 5:00?

A. No. Not on those exact dates. I just — there is no reason for me to call him. I just won't.

Q. Is that different from just January of '87 and why it is, if it is?

A. Yes.

Q. And why?

A. Primarily because I was working on that mobile home to get it ready for rentals — well, it was already rented — get it ready for rental and occupancy the first of February.

APPENDIX K — TRANSCRIPT OF TESTIMONY (EXCERPTS) OF DEFENDANT AT EVIDENTIARY HEARING ON DEFENDANT'S POST TRIAL MOTION ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL HELD JANUARY 5, 1990, AND COMPLETED JANUARY 12, 1990, BEFORE HONORABLE DONALD O'MALLEY, SPECIALLY PRESIDING JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

[commencing at page 3]

BY MR. FERRY:

Q. Would you state your name and address?

A. Edward Billheimer, R.D. #2, Box 350, Drums, Pennsylvania, 18222.

Q. With whom do you reside?

A. My wife and my son.

Q. Mr. Billheimer, let me bring you back to the time frame from when you obtained representation through the Public Defender's Office on matters that we are before the Court today on, on post trial relief. Do you recall when you first had contact with the Public Defender"s Office?

A. My first contact was shortly after my arrest date I had written to them asking for a public defender and they denied me saying that my assets were too great.

Q. Did you meet with any public defender, any attorney of the Public Defender's Office?

A. Prior to the preliminary hearing, no.

Q. And what happened with the initial denial of your assets, you did eventually have public defender representation?

* * *

[5] itself. We had to rush, rush, chitchat in the hallway, maybe eight to ten minutes,

Q. And who was that with?

A. Myself and Attorney Flannery.

Q. Was anyone else present?

A. My wife and my son were down the hallway from me.

Q. So your wife and son were witnesses in your defense —

A. Yes.

Q. — subsequently?

A. Yes.

Q. Did Attorney Flannery interview as to circumstances as to what occurred and interview your two witnesses?

A. He spoke with me briefly and I tried to bring out pertinent facts for him to bring out such as her boyfriend being involved with this sort of thing, the fact that I hunt is part of my defense.

Q. And the total time prior to the preliminary hearing then you say was five to eight minutes, is that what you said.

MS. CIANFLONE: Objection, Your Honor, I don't believe that was his testimony.

[6] BY MR. FERRY:

Q. Tell me what you said?

A. Originally I said ten minutes, it could have been eight or ten minutes.

Q. And then did you go through with the preliminary hearing?

A. Yes, we did.

Q. Did you or any witnesses on your behalf testify at the preliminary hearing?

A. No.

Q. Now after the preliminary hearing, did you have any contact or dialogue with Attorney Flannery or any other representative of the Public Defender's Office?

A. It was approximately one week later, two weeks later, I'm not sure exact time, date, I phoned him. I got him in his office and I spoke to him maybe ten minutes on the phone. And he had assured me at that time that he says, don't worry about a thing, it will be a long time until the trial.

Then he says, I will meet with you a couple days before the trial and we will sit down for two or three hours and we will go over things.

[7] Q. And what was the context of that conversation otherwise in that time frame that you talked with him; did you talk about aspects of your defense, possible witnesses, anything along those lines?

A. Yes, I mentioned to him I had witnesses who could put me out of the home at the time. I told him I had several people volunteer as character witnesses for me.

Q. Were any of those individuals that you are referring to called at trial?

A. No.

Q. Were any of them to your knowledge interviewed by Attorney Flannery or anyone from the Public Defender's Office?

A. No, they weren't.

Q. When after this telephone conversation which you indicated was a few weeks after the preliminary hearing, when was the next time you had contact with Attorney Flannery or anyone else from the Public Defender's Office?

A. Okay. I had gotten my notice just before Christmas about the date of trial. And the next week, I think Tuesday was the first workday, the exact day I'm not sure, I phoned the Public [8] Defender's Office. I phoned every day. In fact, a couple times on two different days, two or three times, I'm not sure, I have to check

my phone bill. And I kept trying to get in touch with Attorney Flannery and he never returned my calls.

At that time I had just been out of the hospital maybe six, seven, weeks from major stomach surgery, and my doctor did not want me to travel 25 miles. He didn't want me sitting in a courtroom all day, etc. And I was trying to get things arranged with Attorney Flannery to go on doctor's excuse to have a contiuance of at least one month until I was better able to travel. But Attorney Flannery never returned my phone calls.

Q. When was the next time you had contact with Attorney Flannery?

A. The day of the trial in the Public Defender's Office prior to coming over here to the courthouse.

Q. And what was the extent of that contact; tell me what was done; what did you discuss, who was present?

A. The meeting there only lasted about ten minutes, half that time he was shuffling [9] paperwork and basically all he just said, just answer the questions yes or no and don't volunteer any information.

Q. Did he during that time frame or some other time frame interview any of your witnesses, including Mrs. Billheimer or your son?

A. To the best of my knowledge, no.

Q. Was there any other contact between you and Attorney Flannery or Attorney Flannery and either your wife or your son or

to your knowledge any other individuals who indicated would be witnesses on your behalf of your innocence and character besides those you described just now?

A. No.

Q. During the course of the trial were there breaks in between during the course of the trial, lunch breaks, anything along those lines?

A. Yes, there were.

Q. Did you have contact with Attorney Flannery during those time frames discussing your testimony or your witnesses' testimony or any contact with your witnesses?

A. No.

Q. Do you feel that you, by Attorney Flannery, were fully informed as to the nature of [10] the crime that you faced?

A. Absolutely not.

Q. Were there any discussions either with Attorney Flannery whether outside whatsoever about any type of plea arrangements, plea discussions of any kind, anything along those lines?

A. It was never discussed.

Q. Did you face Attorney Flannery at all during or after the trial with, ask him about the contacting you more before the trial?

A. At the on set of the trial I asked him, I says, what happened

to — we were supposed to sit down for two or three hours prior to the date of trial. I was trying to call you all week and the week before and no return phone calls. And he looked in his folder at my bail papers and made a remark with a one hundred and twenty-three thousand dollar house, you should have gotten a real lawyer.

Q. Now, Mr. Billheimer, for one thing do you have a home of that value?

A. No, sir, I never did. My home had burnt to the ground just prior to my arrest. I had — it was a mobile home and I was building a

* * *

[12] A. Who would have testified for me?

Q. — correct?

A. Tom Oshefski.

Q. And any other individuals?

A. Frank Horning.

Q. And any others?

A. Several individuals approached me and said they would be more than happy to come in as character references for me.

Q. Were any of these individuals called as witnesses on your behalf?

A. No.

Q. Were any of them contacted by Attorney Flannery?

A. No.

Q. Were you asked to submit as a part of your defense to any type of psychologial evaluation or anything prior to your trial?

A. No.

Q. You took the stand in your own behalf, correct?

A. Yes.

Q. Were there areas that you felt you would have liked to offer in testimony that you were not asked by Attorney Flannery?

APPENDIX L — TRANSCRIPT OF TESTIMONY OF CAROL BILLHEIMER (DEFENDANT'S WIFE) AT EVIDENTIARY HEARING ON DEFENDANT'S POST TRIAL MOTION ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL HELD JANUARY 5, 1990, AND COMPLETED JANUARY 12, 1990, BEFORE HONORABLE DONALD O'MALLEY, SPECIALLY PRESIDING JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

[commencing at page 27]

Q. And at the Pretrial Motion Hearing as well?

A. Right.

Q. Were you able to before testifying, discuss with Attorney Flannery what you had to offer?

A. No.

Q. Were you present during Mr. Billheimer's meeting with Attorney Flannery prior to the Preliminary Hearing?

A. In the Public Defenders' office, I was, yes.

Q. No. Prior to the Preliminary Hearing at the District Justice's office?

A. Yes.

Q. And did you have an opportunity to discuss with Attorney Flannery in those few minutes what you had to offer in this case?

A. No.

Appendix L

Q. Did Attorney Flannery in this ten minutes prior to the Preliminary Hearing, did he ask you any questions?

A. No.

Q. Who did the talking primarily in that meeting?

[28] A. At the —

Q. At District Justice's office?

A. He just talked to my husband on the side; and then he called my son and myself over and he asked if we were going to testify. And we said we would, and that was it.

Q. He didn't ask you what you were going to testify to?

A. No.

Q. Did he offer any kind of advice or information?

A. No. Not there.

Q. Subsequently, were you somehow a party on another line or something, a phone call, that Mr. Billheimer says took place two or three weeks after the Preliminary Hearing that he had? Were you listening in on that or taking part in that conversation?

A. (No response.)

Q. After your meeting with your husband and Attorney Flannery, those few minutes before the Preliminary Hearing, did

you have any contact with Attorney Flannery from him or from anyone from the Public Defenders' office? You personally, between that time and the trial day?

[29] A. No. Just that day.

Q. On the trial date, did you have an opportunity to discuss with Attorney Flannery what you had to offer as far as testimony?

A. No.

Q. Did you just take part in the meeting with your husband, that ten minute meeting?

A. Yes.

Q. Did you feel there was information that could have offered that you did not testify to that you weren't asked to provide?

A. Quite a bit, yes.

Q. Can you give some examples?

A. Well, for one, they didn't ask the size of our home, when we lived in the mobile home at the time. And our bedroom was in the back, and it was always cold back there.

Q. Tell me why it's important, the size of your home?

A. It was a 10 x 45 foot trailer.

Q. Why would that be important to the charges facing your husband?

Appendix L

A. Because we could see from one end to the other what was going on. There was no way anything could have went on that we wouldn't have

* * *

APPENDIX M — TRANSCRIPT OF TESTIMONY OF ADRIAN BILLHEIMER (DEFENDANT'S SON) AT EVIDENTIARY HEARING ON DEFENDANT'S POST TRIAL MOTION ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL HELD JANUARY 5, 1990, AND COMPLETED JANUARY 12, 1990, BEFORE HONORABLE DONALD O'MALLEY, SPECIALLY PRESIDING JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

[commencing at page 39]

Q. In fact you did testify you would have the view of the entire trailer?

A. That's right.

MR. FERRY: That's all that I have for Mrs. Billheimer.

MS. CIANFLONE: I have nothing else, Your Honor.

THE COURT: Thank you. You may step down.

MR. FERRY: I would call Adrain [sic] Billheimer.

ADRIAN BILLHEIMER, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FERRY:

Q. Mr. Billheimer, what is your relationship to Edward Billheimer?

A. He's my father.

Q. And Mr. Billheimer, do you recall that there is two dates in December of 1987 that these crimes were allegedly committed?

A. Yes.

Q. Do you recall either of those dates whether or not your father was at home?

A. I believe one of them was December [40] 3rd; and I remember that because the day before I had an accident with my truck and that night my dad was coming home from hunting and my mom's car broke which he had.

So that following day, which would be December 3rd, he was working on that all day; but he had to take me to work and my sister to school. And then in the afternoon, my mom picked me up or picked my sister up first and then picked me up; and then he went to Purcell's after I got home. And I finished putting the car together which he had been working on all day.

Q. Was your father alone with Dawn on December 3rd, 1987?

A. No, he wasn't.

Q. And were you asked that question at the trial?

A. No. I don't believe I was.

Q. Now, Mr. Billheimer, during the dates that were alleged in January of '87 and the two dates in December of '87, were you home during the times that the events were alleged to have occurred?

A. During January, yes, I was.

Q. And were you able in your home to see [41] everything that would go on in that home?

A. Yes.

Q. And did you observe any type of activities that were alleged?

A. No, I didn't.

Q. Could they have gone on without you seeing them?

MS. CIANFLONE: Objection, Your Honor. This is not a re-trial.

THE COURT: Yeah.

BY MR. FERRY:

Q. Were you asked any questions along the lines that I was just discussing with you?

A. No, I was not.

Q. Mr. Billheimer, did you have an opportunity to discuss with Attorney Flannery or anyone else from the Public Defenders' office what testimony you could offer and your testifying in general?

A. I was only asked prior to the Preliminary Hearing — I was only asked if I would testify which I said I would. And then just the instructions Attorney Flannery gave us prior to the trial.

Appendix M

Q. And what instructions were those? Do [42] you recall?

A. Just to answer yes or no and don't add anything to it.

Q. Were there any other instructions or guidance?

A. No. That was all.

Q. Did you have any other contact with Attorney Flannery except the two that you just described?

A. No.

Q. Or with anyone else from the Public Defenders' office?

A. Nope.

MR. FERRY: I have no further questions.

CROSS EXAMINATION

BY MS. CIANFLONE:

Q. Mr. Billheimer, you were in fact asked about your activities during the month of December 1987, were you not?

A. I don't believe I was. I'm not sure.

Q. Do you remember me asking you if you were working in December of 1987 until 5:00 and you indicated that you did?

A. Yes.